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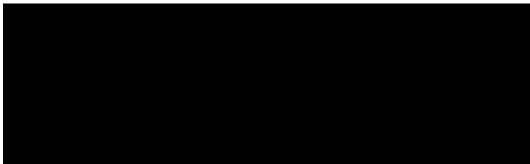
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



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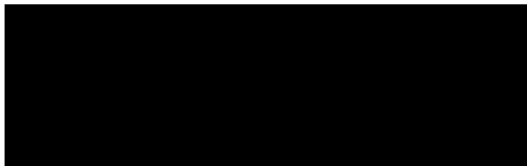
FILE: LIN 06 125 52326 Office: NEBRASKA SERVICE CENTER Date: FEB 02 2010

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer consulting company. It seeks to employ the beneficiary permanently in the United States as a Project Manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not have a degree equivalent to a U.S. Master's degree in business administration, management information systems, or computer applications.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

As set forth in the director's April 10, 2007 denial, the issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Eligibility for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

With the I-140 petition, the petitioner submitted an evaluation from [REDACTED] dated November 27, 2000, and an evaluation report dated April 18, 2002, written by [REDACTED] Mr. [REDACTED] states that the beneficiary’s three-year bachelor of commerce program was the equivalent of three years of academic studies from an accredited U.S. college or university. He also stated that based on the beneficiary’s two-year Master’s program, she had satisfied “substantially similar requirements” for a U.S. Master’s in Business Administration.

[REDACTED] examined the beneficiary’s course work at Gujarat University and stated that the beneficiary, based on her studies in business administration at Gujarat University, had the equivalent of a U.S. master’s of business administration, and that through her formal education, supplemental training and work experience, the beneficiary had the educational background of an individual with a U.S. bachelor’s degree in management information systems.³ The petitioner also submitted a copy of the beneficiary’s postsecondary Bachelor of Commerce diploma from Gujarat University, with accompanying three Statements of Marks for the school years 1990 to 1992; and a copy of the beneficiary’s Master of Commerce from Gujarat University dated March 29, 2000 with one accompanying Statement of Marks for an examination held in April 1993.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ [REDACTED] also referenced the beneficiary’s one-year post graduate program and diploma in computer applications from Xavier Board for Computer Education and her letters of employment experiences in her evaluation and also referred to a letter not found in the record from [REDACTED] Professor of Computer Science, Western Washington University.

In response to the director's RFE dated October 11, 2006, the petitioner resubmitted [REDACTED] report and submitted an additional academic evaluation dated September 29, 2006 written by [REDACTED]. Ms. [REDACTED] states that the beneficiary's post graduate diploma is equivalent to the completion of a professional training program in computer applications from a private organization in the United States and that the beneficiary had the equivalent of a bachelor's and master's degree in business administration from an accredited U.S. college or university, based on the beneficiary's three-year baccalaureate degree in commerce and her two-year Master's degree in commerce.⁴

The petitioner also submitted a letter dated September 26, 2006 from [REDACTED] of Management and Information Systems, Seattle Pacific University. In his letter, [REDACTED] states that the beneficiary has the equivalent of a master's degree in business administration based on her bachelor of commerce degree, equivalent to three years of university level credits from a U.S. accredited college or university, plus her master of commerce which is equivalent to two years of university level credits from a U.S. accredited college or university. [REDACTED] appears to state that the beneficiary earned a U.S. equivalent baccalaureate based on her three years of undergraduate degree studies and one year of her master's studies. He also stated that he utilized the five years of the beneficiary's education at Gujarat University to obtain the equivalent of a U.S. master's degree in business administration. [REDACTED] notes that an MBA degree does not have a standard of six years of college level credits, and a large number of U.S. accredited colleges and universities offer a combined undergraduate business degree plus an MBA, through five years of studies.

On appeal, counsel submits a copy of *Matter of Sea*, Int. Dec. 3089, (1988) and *Matter of Shah*, Int. Dec. 2757 (1977). Counsel also submits information on U.S. colleges and universities offering five-year master's degree programs. In a subsequent submission, counsel submits a copy of a letter dated January 7, 2003, from [REDACTED] Business and Trade Services. In his letter, [REDACTED] stated that it is not the intent of the regulations that only a single foreign degree may satisfy the equivalency requirement provided the proper credential evaluation services finds that the foreign degree or degrees are the equivalent of the required U.S. degree.

With regard to the petitioner's evaluation reports, the AAO notes that all evaluators state that the beneficiary's three-year baccalaureate degree in commerce is the equivalent of three years of study in a U.S. university or college. None of the evaluators reached the conclusions that the beneficiary's undergraduate degree is the equivalent of a four-year U.S. baccalaureate. Their statements with regard to the beneficiary's master's program being two years in duration are not established by the record that only contains a transcript for school year 1993. All of the evaluations are in conflict with the beneficiary's statements on Part B, ETA Form 750 that indicated she studied for one year to receive her Master of Commerce degree. Further only [REDACTED] references the fact that the

⁴ The AAO notes that [REDACTED] evaluation varies from the beneficiary's signed statements on Part B, ETA Form 750. As will be discussed further in these proceedings, the beneficiary indicated she studied for the Master's program from May 1993 to April 1994, thus, a one-year Master's program.

petitioner identified six years of college level studies as the requisite number of years required for the proffered position.

U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). The AAO finds all the evaluations are in conflict with the record of evidence, and with the petitioner's ETA Form 750, and gives no weight to these evaluations.

Further with regard to the equivalency of the three year baccalaureate degree combined with a one or two year Master's degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." AACRAO, <http://www.aacrao.org/about/> (accessed December 22, 2009). Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.* According to the login page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. [REDACTED] "AACRAO EDGE Login," <http://aacraoedge.aacrao.org/index.php>

The AAO notes that authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

In the section related to the Indian educational system, EDGE provides that a three-year Bachelor of Science degree "The Bachelor of Arts/Bachelor of Commerce/Bachelor of Science represents attainment of a level of education comparable to two to three years of university study in the United States. Credit may be awarded on a course-by-course basis."

In the section related to the Indian educational system, EDGE provides that a Master of Science following a three-year bachelor's degree "represents the attainment of a level of education comparable to a bachelor's degree in the United States." The AAO notes that this information is inconsistent with the evaluations submitted. (See enclosed EDGE excerpts.)

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). See also 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.”⁵ In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor’s degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an “official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree.” For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of “an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.” We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a “baccalaureate means a bachelor’s degree received *from a college or university*, or an equivalent degree.” (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). Compare 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of “an

⁵ Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the “equivalence to completion of a college degree” as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability”). The record contains evidence that Gujarat University is a college or university; however, the record does not establish that the diplomas that the beneficiary received is the equivalent of a either a four-year U.S. baccalaureate degree, or a U.S. master’s degree.

Because the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree, namely, a U.S. master’s degree in the stipulated fields of study.

The petitioner also submitted evidence of five-year Master’s in Business Administration programs in the United States. The existence of five-year master’s programs in the United States is not relevant to an evaluation of the beneficiary’s education, which was not obtained through one of these U.S. programs. At issue is whether the beneficiary’s three-year program in commerce and either a one-year or two-year master’s program are comparable to a U.S. Master’s degree.

We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL’s role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS’s decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: “The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.” *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, “Offer of Employment,” describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education and experience required for the proffered position of Project Manager in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: Grade School (Blank)
 High School (Blank)
College: Six

College Degree Required: Master’s
Major Field of Study: Bus Admin, MIS or Comp Applications
Experience: 3 years in the proffered position, or
 3 years in the related occupation of project lead or team lead

Block 15: (Blank)

The beneficiary indicated that she completed a bachelor's degree in commerce, studying from May 1990 to January 1993, and also completed a master's degree in commerce, studying from May 1993 to April 1994 at Gujarat University, Ahmedabad, India. She also indicated that she had received a post graduate diploma in computer applications from Xavier Board for Computer Education, India, and also training from [REDACTED] in India. The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The AAO further notes that the petitioner on the Form ETA 750 clearly specified six years of college level studies as the requisite minimum level of education.⁶ Either under the beneficiary's three-year bachelor of commerce and her claimed two-year Master of Commerce degree or documented one-year Master of Commerce, the beneficiary does not have six years of college-level studies.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁶ As noted previously, only [REDACTED] remarks on the requisite six years of college level studies identified on the ETA Form 750.